

The Honorable Robert S. Lasnik

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OCEAN BEAUTY SEAFOODS, LLC, an
Alaska limited liability company,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, P.A., a
Pennsylvania corporation,

Defendant.

NO. 2:12-cv-01331-RSL

PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE: DUTY TO DEFEND

NOTE ON MOTION CALENDAR:
Friday, June 7, 2013

TABLE OF CONTENTS

I.	INTRODUCTION AND RELIEF REQUESTED	1
II.	STATEMENT OF FACTS	2
A.	Ocean Beauty and the National Union Policy	2
1.	Basic Terms and Coverage Grant	2
2.	Duty to Defend.....	3
B.	The Federal Grand Jury Proceeding	4
1.	The December 2008 Search Warrants and Document Subpoena	4
2.	The 2009 Target Letter and Grand Jury Subpoenas to Individual Insureds.....	5
3.	The August 2011 Plea Demands	6
4.	The Insured Parties’ Defense Effort	6
5.	The Written Settlement Demands	7
6.	The Settlement with the U.S. Government	7
C.	Ocean Beauty’s Tender of the Underlying Claim and National Union’s Belated Acceptance.....	8
1.	Ocean Beauty Tendered Defense of the Search Warrants and Subpoenas, and National Union Refused to Defend.....	8
2.	Ocean Beauty Tendered the September 2011 Plea Demands, and National Union Again Refused to Defend.	9
3.	Ocean Beauty Tendered the February 27, 2012 Settlement Demand, and National Union Did Not Defend.....	9
4.	Ocean Beauty Tendered the April 2012 Written Settlement Demand—and National Union <i>Accepted</i> the Tender.....	9
III.	ARGUMENT AND AUTHORITIES	10
A.	Ocean Beauty Was Entitled to a Defense Because “Claim” Can Reasonably Be Interpreted to Include the Subpoenas, Search Warrants, Target Letter, and Plea Demands.....	10

1	B.	National Union’s Duty to Defend Was Triggered in December 2008.....	12
2			
3	1.	The Subpoenas, Search Warrants, and Target Letter Fell	
4		Within the Plain Meaning of the Policy’s Definition of	
5		“Claim.”	12
6			
7	2.	The Case Law Confirms that Subpoenas and Search Warrants	
8		Are “Claims” Under D&O Policies.	13
9			
10	a.	<i>Polychron v. Crum & Forster Ins. Cos.</i>	14
11	b.	<i>Gold Tip, LLC v. Carolina Cas. Ins. Co.</i>	14
12			
13	c.	<i>Agilis Benefit Servs., LLC v. Travelers Cas. & Surety</i>	
14		<i>Co. of Am.</i>	15
15			
16	d.	<i>Minuteman Int’l, Inc. v. Great Am. Ins. Co.</i>	15
17			
18	e.	<i>Richardson Elecs., Ltd. v. Fed. Ins. Co.</i>	16
19			
20	C.	The August 2011 Plea Demands and February 27, 2012 Settlement	
21		Demand Are Claims Under the Policy, and Are Indistinguishable from	
22		the April 2012 Communication that National Union Accepted as a	
23		Claim.....	19
24			
25	D.	National Union Is Liable for Ocean Beauty’s Defense Costs from	
26		December 2008 Through the Date of the Court’s Ruling on this	
27		Motion—the Period of Legal Uncertainty—Regardless of the Court’s	
28		Ultimate Coverage Decision.	19
29			
30	E.	National Union’s Notice-Based Defense Fails.	20
31			
32	1.	The Issue—National Union Claims Ocean Beauty Did Not Use	
33		the “Magic Word.”	20
34			
35	2.	There Is No Material Difference Between a Duty to Defend	
36		and a Duty to Advance Defense Costs: The Standard Is the	
37		Same and National Union Was Obligated to Do One or the	
38		Other.	21
39			
40	3.	Ocean Beauty Unmistakably Sought Coverage—Which	
41		Necessarily Included a Defense—and National Union Treated	
42		the Claim Accordingly.....	22
43			
44	4.	“Tender” Would Have Been Futile, and National Union Cannot	
45		Prove Prejudice Resulting from Any Failure to Clearly Tender....	23

IV. CONCLUSION.....24

TABLE OF AUTHORITIES

Cases

<i>Agilis Benefit Servs., LLC v. Travelers Cas. & Surety Co. of Am.</i> , No. 5:08-CV-213, 2010 WL 8573372 (E.D. Tex. Apr. 30, 2010)	14, 15, 16, 18
<i>Am. Best Food, Inc. v. Alea London, Ltd.</i> , 168 Wn.2d 398 (2010).....	passim
<i>Boeing Co. v. Aetna Cas. & Surety Co.</i> , 113 Wn.2d 869 (1990).....	12
<i>Center for Blood Research, Inc. v. Coregis Ins. Co.</i> , 2001 WL 34088617 (D. Mass. Nov. 14, 2001)	17, 18, 19
<i>Diamond Glass Cos., Inc. v. Twin City Fire Ins. Co.</i> , No. 06-CV-13105, 2008 WL 4613170 (S.D.N.Y. Aug. 18, 2008)	17, 18, 19
<i>Gold Tip, LLC v. Carolina Cas. Ins. Co.</i> , No. 2:11-CV-00765, 2012 WL 3638538 (D. Utah Aug. 23, 2012).....	14, 15, 16, 18
<i>Griffin v. Allstate Ins. Co.</i> , 108 Wn. App. 133 (2001).....	23
<i>Kitsap County v. Allstate Ins. Co.</i> , 136 Wn.2d 567 (1998).....	12
<i>Liberty Mut. Ins. Co. v. Pella Corp.</i> , 650 F.3d 1161 (8th Cir. 2011)	21
<i>Minuteman Int’l, Inc. v. Great Am. Ins. Co.</i> , No. 03 C 6067, 2004 WL 603482 (N.D. Ill. Mar. 22, 2004)	15, 16, 18
<i>Nat’l Surety Corp. v. Immunex Corp.</i> 297 P.3d 688, --Wn.2d-- (2013)	10, 11, 12
<i>Office Depot, Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA</i> , 734 F. Supp. 2d 1304 (S.D. Fla. 2010).....	17, 18, 19
<i>Pederson’s Fryer Farms, Inc. v. Transamerica Ins. Co.</i> , 83 Wn. App. 432 (1996).....	23
<i>Polychron v. Crum & Forster Ins. Cos.</i> , 916 F.2d 461 (8th Cir. 1990).....	14, 16, 18
<i>Puget Sound Serv. Corp. v. Bush</i> , 45 Wn. App. 312 (1986).....	23
<i>Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha</i> , 126 Wn.2d 50 (1994)	13
<i>Richardson Elecs., Ltd. v. Fed. Ins. Co.</i> , 120 F. Supp. 2d 698 (N.D. Ill. 2000)	16, 18
<i>Truck Ins. Exch. v. VanPort Homes, Inc.</i> , 147 Wn.2d 751 (2002)	20
<i>Woo v. Fireman’s Fund Ins. Co.</i> , 161 Wn.2d 43 (2007)	10, 11, 12, 18

Statutes

WAC 284-30-330(13)..... 24

Other Authorities

U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-11.151 (1997)..... 6

I. INTRODUCTION AND RELIEF REQUESTED

This is an insurance coverage dispute between Ocean Beauty Seafoods, LLC (“Ocean Beauty”) and its directors and officers (“D&O”) insurer, National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”). The dispute arises out of a proceeding brought against Ocean Beauty by the U.S. Department of Justice (the “DOJ proceeding”). The DOJ proceeding began in December 2008, when federal agents executed search warrants and grand jury subpoenas on Ocean Beauty at its Seattle headquarters and other facilities. Shortly after the search, it was confirmed that the company and certain of its employees were the targets of a criminal investigation into distribution of allegedly adulterated salmon products. That being the case, Ocean Beauty treated the matter seriously: it commenced a costly and complex defense effort on behalf of the company and the targeted employees. That defense was fundamentally successful, and resulted, four years later, in a favorable settlement.

When Ocean Beauty tendered the subpoenas and search warrants under its D&O policy (the “Policy”),¹ National Union denied coverage, relying on an interpretation of the Policy’s definition of “Claim” that is unsupported by the policy language, inconsistent with Washington’s standards governing the liability insurer’s duty to defend, and contrary to the case law addressing the definition of “Claim.” It was not until April 24, 2012 that National Union accepted Ocean Beauty’s tender of defense of the DOJ proceeding, and then on a going-forward basis only. National Union continues to refuse to pay Ocean Beauty’s covered defense costs incurred between December 2008 and April 24, 2012. Accordingly, Ocean Beauty seeks partial summary judgment declaring that it is entitled, under the Policy, to payment of its reasonable and

¹ The Policy is attached as Exhibit A to the Declaration of Anthony Ross (“Ross Decl.”) in support of this motion.

1 necessary defense costs incurred in defending against the DOJ proceeding from December 2008
 2
 3 to April 24, 2012.
 4

5 This motion does not seek a ruling on: (a) the amount of Ocean Beauty's damages; or
 6
 7 (b) the merits of its extracontractual (bad-faith and Washington Insurance Fair Conduct Act)
 8
 9 claims against National Union. Rather, this motion seeks a ruling only that the Policy covers
 10
 11 Ocean Beauty's defense costs (including those paid on behalf of the individual insureds) incurred
 12
 13 in connection with the proceedings described herein. Ocean Beauty's extracontractual claims
 14
 15 and the amount of its damages will be addressed in further proceedings.
 16

17 **II. STATEMENT OF FACTS**

18 **A. Ocean Beauty and the National Union Policy**

19
 20 Ocean Beauty, founded in 1910 as Washington Fish & Oyster, is a Seattle-based pioneer
 21
 22 in the Northwest and Alaska seafood industry. It is a vertically integrated seafood producer, and
 23
 24 maintains company-owned processing, distribution, and sales outlets in Alaska and throughout
 25
 26 the United States and Japan. Ocean Beauty's products include canned, smoked, and wild
 27
 28 salmon. Ross Decl. ¶ 2.
 29

30
 31 Ocean Beauty purchased the Policy, bearing number 552-32-70, from National Union.
 32
 33 The Policy was in force from January 10, 2008 to January 10, 2009, and provided liability
 34
 35 coverage subject to a limit of \$10 million. *Id.*, Ex. A. Ocean Beauty is a subsidiary of named
 36
 37 insured Ocean Beauty Holdings, Inc. and a named insured by endorsement. *Id.* at 1, End. 12.
 38

39 **1. Basic Terms and Coverage Grant**

40
 41 The DOJ proceeding implicates two of the Policy's coverages: (1) the entity coverage,
 42
 43 designated coverage B(i) under the Policy, which covers third-party claims asserted against
 44
 45 Ocean Beauty itself; and (2) coverage B(ii), which covers Ocean Beauty for costs it incurs in

indemnifying individual employees against liability claims they incur in the course of their work on behalf of the company. The insuring agreement that grants both of those coverages provides in relevant part as follows:

This policy shall lay the Loss of the Company arising from a:

- (i) Claim first made against the Company, or
- (ii) Claim first made against an Individual Insured

. . . for any actual or alleged Wrongful Act, but in the case of (ii) above, only when and to the extent that the Company has indemnified the Individual Insured for such Loss pursuant to law, common or statutory, or contract, or the Charter or By-laws of the Company

Id. at 1, § 1.B.

The Policy defines “Claim,” in relevant part, as:

- (1) a written demand for monetary or non-monetary relief (including any request to toll or waive any statute of limitations); or
- (2) a civil, criminal, administrative, regulatory, or arbitration proceeding for monetary or non-monetary relief which is commenced by:
 - (i) service of a complaint or similar pleading; or
 - (ii) return of an indictment (in the case of a criminal proceeding); or
 - (iii) receipt or filing of a notice of charges

Id. at 2, § 2(b).

2. Duty to Defend

The Policy imposes a duty to defend on National Union. Clause 8 of the Policy provides:

[T]he Insureds shall have the right to tender the defense of the Claim to the Insurer, which right shall be exercised in writing by

the Named Entity on behalf of all Insureds to the Insurer pursuant to the notice provisions of Clause 7 of this policy. This right shall terminate if not exercised within 30 days of the date the Claim is first made against an Insured Provided that the Insureds have complied with the foregoing, the Insurer shall be obligated to assume the defense of the Claim, even if such Claim is groundless, false, or fraudulent

Id. at 11, § 8.

Where the Insured does not elect to tender the defense of a Claim, National Union must still advance defense costs, *i.e.*, pay them as they are incurred during the defense of the underlying claim, at the written request of the Insured. *Id.* at 12.

B. The Federal Grand Jury Proceeding

1. The December 2008 Search Warrants and Document Subpoena

On December 9, 2008, agents from the Federal Bureau of Investigation, Food and Drug Administration, and Immigration and Customs Enforcement executed search warrants on three Ocean Beauty facilities: corporate headquarters in Seattle, a salmon smoking facility in Monroe, Washington, and a salmon smoking facility in Los Angeles. Ross Decl., Exs. B–D. The search warrants authorized the seizure of documents “constituting evidence, instrumentalities, or fruits” of Ocean Beauty’s alleged introduction of contaminated seafood into interstate commerce in violation of “Title 18, United States Code, Section 1001 and Title 21, United States Code, Sections 331(a) and (c) and 333(a)(2)” *Id.* at Attachment B.

This was not a dispassionate, written request for information; the government did not send a letter and politely await Ocean Beauty’s response. Nor was there ever any pretense that Ocean Beauty was a mere third-party witness. To the contrary, approximately 80 armed federal agents coordinated a surprise search at three facilities in two states. Ross Decl. ¶ 3; *see also* Declaration of Diane Miller in Support of Plaintiff’s Motion for Partial Summary Judgment

1 (“Miller Decl.”) ¶ 5 (approximately 20 agents searched the Monroe facility). Employees were
 2
 3 detained for questioning, including Diane Miller, plant manager in Monroe. *Id.* ¶ 1. Ms. Miller
 4
 5 was held in the employee lunch room for questioning, and was accused of processing
 6
 7 contaminated fish, accused of lying about it to FDA inspectors, and threatened with jail time.
 8
 9 Federal agents also told Ms. Miller that other Ocean Beauty employees would be “looking at 20
 10
 11 years” in prison. *Id.* ¶ 4. The agents remained at the Monroe facility for over 12 hours—until
 12
 13 after 9:00 p.m. As a result, production activities were halted for much of the day. *Id.* ¶ 5.
 14

15 The same day, federal agents served a grand jury subpoena on Ocean Beauty, demanding
 16
 17 similar materials to those identified in the search warrants. Ross Decl., Ex. E. The subpoena
 18
 19 was accompanied by correspondence specifying that it was served pursuant to “an official Grand
 20
 21 Jury investigation of suspected violations of the Federal criminal laws” *Id.*
 22

23 **2. The 2009 Target Letter and Grand Jury Subpoenas to Individual Insureds**

24
 25 In early 2009, Assistant United States Attorney Patricia C. Lally caused subpoenas to be
 26
 27 served on Ocean Beauty employees Charles Jensen, Gary Osburn, David Forbush, Don Rader,
 28
 29 Ron Christiansen, Kimbeau Try, and Diane Miller. *See* Declaration of Jeffrey Coopersmith in
 30
 31 Support of Plaintiff’s Motion for Partial Summary Judgment (“Coopersmith Decl.”), Ex. C; Ross
 32
 33 Decl. ¶ 5. All were Ocean Beauty employees to whom Ocean Beauty owed an indemnification
 34
 35 obligation. Ross Decl. ¶ 5; *id.*, Ex. A, at 1 § 2.B(ii).
 36

37 By letter to Ocean Beauty’s counsel dated January 13, 2009, Ms. Lally confirmed that
 38
 39 employees Jensen, Osburn, Forbush, Rader, Christianson, Try, and Miller were “targets” of a
 40
 41 federal criminal investigation. Coopersmith Decl., Ex. F. Ms. Lally also maintained throughout
 42
 43 the proceeding that the company itself was a target. Coopersmith Decl. ¶ 4. In the criminal
 44
 45 context, “target” has a specific meaning. According to the United States Attorneys’ Manual at

§ 9-11.151, “a ‘target’ is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” A “target” is distinguishable from the less-serious “subject” of an investigation. U.S. Dep’t of Justice, U.S. Attorneys’ Manual § 9-11.151 (1997).

3. The August 2011 Plea Demands

In August 2011, the DOJ began issuing plea demands to certain of the individual insureds. The demands, made to Mr. Rader, Ms. Miller, Mr. Try, and Jim Yonker, sought guilty pleas to misdemeanor strict-liability violations of the Food, Drug & Cosmetics Act, 21 U.S.C. §§ 331(a) and 333(a)(1). Coopersmith Decl., Exs. H, I. Under the proposed plea agreements, each individual would have faced statutory penalties, including imprisonment for up to one year, a fine of up to \$1,000, and a period of supervision following release from prison of up to one year, among other penalties. *Id.* at 1, 2.

4. The Insured Parties’ Defense Effort

Promptly upon receipt of the December 2008 grand jury subpoena and search warrants, Ocean Beauty retained Jeffrey Coopersmith of the Seattle office of DLA Piper as lead defense counsel. Ross Decl. ¶ 7; Coopersmith Decl. ¶ 1. Between December 2008 and March 2012, Ocean Beauty, with DLA Piper’s assistance, vigorously defended against the government’s allegations. This effort included an extensive internal investigation of the allegations, responding to the government’s requests for information and testimony, and refuting the government’s factual allegations and legal theories. Coopersmith Decl. ¶ 8. In March 2012, Ocean Beauty retained new defense counsel, Calfo Harrigan Leyh & Eakes, LLP. Ross Decl. ¶ 7. Calfo Harrigan continued the defense effort, as well as negotiations with the government toward a resolution of its claims. *Id.*

1 Soon after they were served with grand jury subpoenas in early 2009, each of the
2
3 individual insureds also retained (separate) counsel. The individuals worked with their counsel
4
5 throughout 2009–2012 to defend against the government’s claims and, ultimately, negotiate a
6
7 resolution. Pursuant to its indemnification obligation, Ocean Beauty paid the defense costs
8
9 incurred by the individual insureds. *Id.* ¶ 6.

10 11 **5. The Written Settlement Demands**

12
13 On February 27, 2012, the DOJ confirmed via e-mail that it was seeking a global
14
15 settlement agreement with Ocean Beauty and the individual insureds. Declaration of Franklin D.
16
17 Cordell in Support of Plaintiff’s Motion for Partial Summary Judgment (“Cordell Decl.”), Ex. A,
18
19 at Tab I. On April 24, 2012, the DOJ set out the terms of that demand in detail, including the
20
21 requirement of a civil damages payment of \$1 million on the part of Ocean Beauty, as well as
22
23 misdemeanor guilty pleas by certain of the individual insureds. Declaration of Angelo Calfo in
24
25 Support of Plaintiff’s Motion for Partial Summary Judgment (“Calfo Decl.”), Ex. A.

26 27 **6. The Settlement with the U.S. Government**

28
29 In January 2013, Ocean Beauty and the individuals reached a settlement with the
30
31 government. Under its terms, one of the target individuals pleaded guilty to strict liability
32
33 misdemeanor violations of the Food, Drug & Cosmetics Act, 21 U.S.C. §§ 331(a) and 333(a)(1).
34
35 Ocean Beauty agreed to make a payment of \$250,000 in a civil settlement of the claims against
36
37 it. Ross Decl. ¶ 8.

1 **C. Ocean Beauty's Tender of the Underlying Claim and National Union's Belated**
2 **Acceptance.**

3
4 **1. Ocean Beauty Tendered Defense of the Search Warrants and Subpoenas,**
5 **and National Union Refused to Defend.**

6
7 By letter dated December 30, 2008, Ocean Beauty notified National Union of the grand
8
9 jury subpoena served on and search warrants executed against it. Coopersmith Decl., Ex. A.
10
11 The letter specified the notice was a notice of *claims*, in addition to "circumstances that may
12
13 reasonably be expected to give rise to a claim," and outlined the work Ocean Beauty's counsel,
14
15 DLA Piper, was performing to defend against the investigation. *Id.* at 1, 2. National Union
16
17 acknowledged receipt of the tender on January 7, 2009. Coopersmith Decl., Ex. B.

18
19 On February 24, 2009, Ocean Beauty informed National Union that certain Ocean Beauty
20
21 employees had been served with grand jury subpoenas. Coopersmith Decl., Ex. D. That
22
23 communication explained that these employees had retained counsel, and that Ocean Beauty was
24
25 advancing expenses. It also explicitly requested a coverage determination from National Union.
26
27 *Id.* In response, claims adjuster Dennis Van Dina stated he was "reviewing the file" and would
28
29 "soon issue our coverage opinion." Coopersmith Decl., Ex. E. There were, however, no
30
31 questions or follow-up on the part of National Union into the nature or extent of the government
32
33 proceedings. Neither does National Union's claim file reflect any consultation with coverage
34
35 counsel. *See* Cordell Decl., Ex. C. On March 26, 2009, National Union denied coverage on the
36
37 basis that the search warrants and subpoenas did not constitute a "Claim" under the Policy.
38
39 Coopersmith Decl., Ex. G.

1 **2. Ocean Beauty Tendered the September 2011 Plea Demands, and National**
 2 **Union Again Refused to Defend.**
 3

4 On August 17, 2011, Ocean Beauty's counsel informed National Union that the U.S.
 5 Attorney's Office had issued plea demands to Ocean Beauty employees Rader, Yonker, Miller,
 6 and Try. Coopersmith Decl., Ex. J. Ocean Beauty attached the draft plea agreements and
 7 specified that the government was seeking guilty pleas to misdemeanor violations of the Food,
 8 Drug and Cosmetic Act. *Id.* Nearly four months later, on December 12, 2011, National Union
 9 advised that it would continue to deny Ocean Beauty a defense on the basis that no "Claim" had
 10 arisen under the Policy. Coopersmith Decl., Ex. K.
 11
 12
 13
 14
 15
 16

17 **3. Ocean Beauty Tendered the February 27, 2012 Settlement Demand, and**
 18 **National Union Did Not Defend.**
 19

20 Ocean Beauty, through its counsel, tendered the government's February 27, 2012 written
 21 confirmation that it was seeking a global settlement to National Union. Cordell Decl., Ex. A, at
 22 Tab I. National Union did not agree to defend.
 23
 24
 25
 26

27 **4. Ocean Beauty Tendered the April 2012 Written Settlement Demand—and**
 28 **National Union Accepted the Tender.**
 29

30 Ocean Beauty tendered the Department of Justice's April 24, 2012 settlement demand
 31 letter to National Union on the day it was received. Cordell Decl., Ex. B. On May 23, 2012,
 32 National Union—now represented by counsel—accepted the defense of the claims. Cordell
 33 Decl., Ex. D. National Union determined that the April 24 letter constituted a "Claim" under the
 34 Policy because it demanded "plea agreements by the three individual defendants" and a
 35 \$1 million payment from Ocean Beauty. *Id.* National Union refused, however, and continues to
 36 refuse, to pay Ocean Beauty's and the individual insureds' defense costs incurred from
 37
 38
 39
 40
 41
 42
 43
 44
 45

December 2008, the time of the search warrants and subpoenas, to April 24, 2012, the date of the government's written settlement demand.

III. ARGUMENT AND AUTHORITIES

A. Ocean Beauty Was Entitled to a Defense Because "Claim" Can Reasonably Be Interpreted to Include the Subpoenas, Search Warrants, Target Letter, and Plea Demands.

This motion is governed by an aspect of Washington insurance law that is particularly well developed and on which the appellate courts have definitively and repeatedly ruled in recent years: the trigger and scope of the liability insurer's duty to defend. Three recent decisions of the Washington Supreme Court—*Woo*,² *American Best Food*,³ and *Immunex*⁴—have forcefully confirmed that the duty to defend in Washington is extraordinarily robust: it is easy to trigger, difficult to terminate, and all uncertainty, legal and factual, must be resolved in favor of providing the policyholder with a defense.

The Washington courts had long held that the duty to defend was broader than and independent of the duty to indemnify. But *Woo* and *American Best Food* added two corollary rules that, had National Union followed them, would have compelled a defense in this case as of December 2008. The first is the "conceivably covered" standard. While the duty to indemnify arises only if the insured's liability is ultimately determined to satisfy the terms of the policy, "the duty to defend is triggered if the insurance policy *conceivably covers* allegations in the complaint." *Am. Best Food*, 168 Wn.2d at 404 (citing *Woo*, 161 Wn.2d at 53).

The second corollary is that all legal and factual uncertainty must be resolved in favor of providing the policyholder with a defense. When the facts or law pertinent to coverage are

² *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43 (2007).

³ *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398 (2010).

⁴ *Nat'l Surety Corp. v. Immunex Corp.* 297 P.3d 688, --Wn.2d-- (2013).

1 susceptible to multiple interpretations, the insurer must defend as long as there is “any
 2 reasonable interpretation . . . that could result in coverage” *Id.* (emphasis added); *see also*
 3 *Woo*, 161 Wn.2d at 60 (holding insurer may not rely on its own interpretation of case law to
 4 determine there is no coverage, rather, “the duty to defend requires an insurer to give the insured
 5 the benefit of the doubt”). In determining whether an insured’s interpretation of the policy
 6 is reasonable, it is not only appropriate for, but incumbent upon, the insurer (and the Court) to
 7 look to out-of-state authority if Washington courts have not addressed the precise situation at
 8 hand. *Am. Best Food*, 168 Wn.2d at 408; *see also Woo*, 161 Wn.2d at 60 (insurer could not rely
 9 on attorney’s opinion that duty to defend was not triggered where attorney acknowledged he
 10 relied on cases that were not directly on point and a Washington court could decide they did not
 11 apply). Where non-Washington authority supports the insured’s interpretation and the
 12 Washington courts have not spoken, the insurer is compelled to defend until that legal
 13 uncertainty is resolved. *Am. Best Food*, 168 Wn.2d at 408 (“The lack of any Washington case
 14 directly on point and a recognized distinction between pre-assault and post-assault negligence in
 15 other states presented a legal uncertainty Because any uncertainty works in favor of
 16 providing a defense to an insured, Alea’s duty to defend arose when Dorsey brought suit”).

17
 18 The Washington Supreme Court recently reaffirmed the broad nature of the duty to
 19 defend in *Nat’l Surety v. Immunex*. *Immunex* reinforced the rule that an insurer must resolve any
 20 doubt in favor of defending its insured. 297 P.3d at 691. Further, the court held that defense
 21 costs paid where the duty to defend is in doubt may not be recouped by an insurer when it is later
 22 determined the defense obligation was not triggered. *Id.* at 693–94. To hold otherwise, the court
 23 reasoned, would render the defense obligation illusory. *Id.*

1 The teaching of Washington law governing the duty to defend is clear, and becomes
 2
 3 unmistakable after *Woo*, *American Best Food*, and *Immunex*: ***When in doubt—meaning when***
 4
 5 ***there is any conceivable legal or factual outcome under which the policy terms might be***
 6
 7 ***satisfied—defend your insured.***
 8

9 **B. National Union’s Duty to Defend Was Triggered in December 2008.**

10
 11 **1. The Subpoenas, Search Warrants, and Target Letter Fell Within the Plain**
 12 **Meaning of the Policy’s Definition of “Claim.”**
 13

14 National Union utterly failed to apply Washington duty-to-defend law when the insurer
 15
 16 received Ocean Beauty’s tender of the search warrants, subpoenas, and target letter in late 2008
 17
 18 and early 2009. All of those events are covered “Claims” under the Policy because they
 19
 20 constitute “written demand[s] for . . . non-monetary relief.” Ross Decl., Ex. A, at 2, § 2(b).
 21
 22 First, as a matter of plain meaning, the actions sought by the search warrants and subpoenas
 23
 24 constitute “relief” under the Policy. The Policy does not define “relief.” In Washington, courts
 25
 26 construe insurance policies as a whole, and give them “a fair, reasonable, and sensible
 27
 28 construction as would be given to the contract by the average person purchasing insurance.”
 29
 30 *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 575 (1998). In that spirit, undefined terms
 31
 32 are to be given their plain, ordinary, and popular meanings. *Boeing Co. v. Aetna Cas. & Surety*
 33
 34 *Co.*, 113 Wn.2d 869, 877 (1990). Where a term is susceptible to both an ordinary meaning and a
 35
 36 lawyerly, technical one, the ordinary meaning controls. *Id.* at 882. Similarly, when the meaning
 37
 38 of a term is not plain, and more than one reasonable interpretation may apply, the term is
 39
 40 ambiguous and must be construed in the insured’s favor. *Kitsap County*, 136 Wn.2d at 576.
 41

42 Here, the subpoenas and search warrants compelled Ocean Beauty, via legal process, to
 43
 44 turn over documents and information involuntarily to the United States. If Ocean Beauty had
 45

1 failed to comply, the government could have sought enforcement in the federal courts—with the
 2
 3 “relief” available at such enforcement proceedings the same relief that is demanded by the
 4
 5 documents themselves: the turning over of documents, computers, and other information.
 6
 7 Ocean Beauty’s compliance with the government’s demands for information, then, plainly is
 8
 9 “relief” within the meaning of the Policy.

10
 11 A reasonable purchaser of insurance would not read the provision any other way. The
 12
 13 definition of Claim expressly includes “a written demand for non-monetary relief (*including any*
 14
 15 *request to toll or waive any statute of limitations*)” Ross Decl., Ex. A, at 2, § 2(b)(1)
 16
 17 (emphasis added). If a request to toll or waive a statute of limitations is “relief” within the
 18
 19 meaning of the Policy, so must be “requests” for cooperation with a grand jury investigation
 20
 21 made to the targets of such investigation at the point of a legal bayonet. If National Union
 22
 23 wanted some other, more narrow or technical definition to apply, it could have made that clear in
 24
 25 the Policy—a “demand for money damages” or an express exception for “investigative demands
 26
 27 seeking only documents and information where the Insured is not a target of the investigation.”
 28
 29 National Union did not do so, and the Court should decline to import one. *See Queen City*
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 31 *Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha*, 126 Wn.2d 50, 67 (1994) (“[I]f the insurers wanted
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 33 an objective standard to apply, they could easily have drafted language to that effect.”). The
 34
 35 Court should construe “relief” to include the actions sought by the subpoenas and search
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 37 warrants, and find that they constitute a “Claim.”

38
 39 **2. The Case Law Confirms that Subpoenas and Search Warrants Are “Claims”**
 40 **Under D&O Policies.**

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 42 No Washington decision addresses whether subpoenas initiating government
 43
 44 investigations constitute “Claims” under a D&O policy. Federal courts in other jurisdictions,
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1 however, have considered the question, and a majority hold such subpoenas are covered
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 3 demands for relief. *Agilis Benefit Servs., LLC v. Travelers Cas. & Surety Co. of Am.*, No. 5:08-
 4
 5 CV-213, 2010 WL 8573372, at *7 (E.D. Tex. Apr. 30, 2010) (citing cases). The on-point
 6
 7 decisions disclosed by Ocean Beauty's research are as follows.

8
 9 **a. *Polychron v. Crum & Forster Ins. Cos.***

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 11 In *Polychron v. Crum & Forster Ins. Cos.*, Chris Polychron was served with a grand jury
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 13 subpoena seeking records of the Grand National Bank from the period when he served as its
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 15 president. 916 F.2d 461, 462 (8th Cir. 1990). Later, an Assistant U.S. Attorney and two IRS
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 17 agents questioned him concerning the documents that had been the subject of the subpoena. *Id.*
 18
 19 Mr. Polychron tendered his defense of the investigation to the bank's D&O insurer, Crum &
 20
 21 Forster, which refused to defend on the basis that no "claim" had arisen under the policy. *Id.*

22
 23 The term "claim" was undefined in the Crum & Forster policy, but the court found the
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 25 plain meaning of the word required a "demand." *Id.* at 463. Over the insurer's objection, the
 26
 27 court held the subpoena initiating the investigation of Mr. Polychron constituted a "demand,"
 28
 29 and therefore a "claim" because it required action on the part of Mr. Polychron. *Id.* In so
 30
 31 holding, the court distinguished between a grand jury investigation and a "mere request[] for
 32
 33 information," finding the subpoena directed at Mr. Polychron initiated a "serious" probe and
 34
 35 "amounted as a practical matter, to an allegation of wrongdoing against Mr. Polychron, for
 36
 37 which he prudently hired an attorney." *Id.* Mr. Polychron's defense costs, then, were covered.

38
 39 **b. *Gold Tip, LLC v. Carolina Cas. Ins. Co.***

40
 41 *Gold Tip, LLC v. Carolina Casualty Ins. Co.* arose out of the Utah County Attorney's
 42
 43 Office's "informal" investigation of a company's CEO. No. 2:11-CV-00765, 2012 WL
 44
 45 3638538, at * 2 (D. Utah Aug. 23, 2012). Gold Tip and the CEO received phone calls and letters

1 from the County Attorney, seeking document productions and meetings with the CEO and
 2 another employee. *Id.* at *4. They tendered the defense of the investigation to Carolina
 3 Casualty, which denied a defense, arguing the investigation did not constitute a “written demand
 4 for monetary or non-monetary relief” within the policy’s definition of “claim.” *Id.* The court
 5 disagreed and held that the letters and requests for information *did* plausibly constitute “written
 6 demands for nonmonetary relief” because the company and the CEO were compelled to
 7 cooperate under threat of legal process. *Id.* (“Gold Tip reasonably believed that if it refused to
 8 cooperate, the Utah County Attorney’s Office would be more inclined to criminally indict . . .”).

17 **c. *Agilis Benefit Servs., LLC v. Travelers Cas. & Surety Co. of Am.***

18 In *Agilis Benefit Services*, the court considered whether a federal grand jury subpoena
 19 served on a company and three of its officers as part of an IRS investigation of alleged tax
 20 evasion constituted a “written demand for non-monetary relief” under a D&O policy. 2010 WL
 21 8573372, at *2. The court held that the subpoena did qualify as a claim under this prong of the
 22 policy’s definition, reasoning that the meaning of “relief” is “broad enough to include a demand
 23 for something due, including a demand to produce documents or appear before a grand jury.” *Id.*
 24 at *6. In so holding, the court found the insurance company could have defined the term “relief”
 25 in the policy, but having not done so, could not rely on an inconclusive legal definition of the
 26 term to deny a defense. *Id.*

37 **d. *Minuteman Int’l, Inc. v. Great Am. Ins. Co.***

38 The court in *Minuteman Int’l, Inc. v. Great Am. Ins. Co.* held an SEC subpoena directed
 39 at Minuteman and its directors and officers was a “written demand for non-monetary relief,” and
 40 therefore a covered “claim.” No. 03 C 6067, 2004 WL 603482, at *7 (N.D. Ill. Mar. 22, 2004).
 41 The court held the subpoena demanded “relief” in the form of appearances for depositions and
 42

1 the production of documents, and reasoned that “the SEC could have brought suit in court to
 2 require compliance with the subpoena.” *Id.* The court, like that in *Polychron*, noted that a
 3 government subpoena is not a “mere request for information, but a substantial demand for
 4 compliance by a federal agency with the ability to enforce its demand.” *Id.* As a result,
 5 Minuteman was entitled to a defense under the policy. *Id.*

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 11 **e. *Richardson Elecs., Ltd. v. Fed. Ins. Co.***

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 13 *Richardson Electronics, Ltd. v. Federal Ins. Co.* held that subpoenas issued as part of a
 14 DOJ antitrust investigation constituted claims. 120 F. Supp. 2d 698, 701 (N.D. Ill. 2000).
 15 Because “the Justice investigation required Richardson and its officers and directors to comply
 16 with various demands for testimony and production of documents,” there was a “demand for
 17 something due” within the meaning of the term “claim.” *Id.* Again, the court underscored the
 18 seriousness of a DOJ investigation as compared to routine requests for information. *Id.*

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 24
 25 Like the courts in *Polychron*, *Gold Tip*, *Agilis*, *Minuteman*, and *Richardson*, this Court
 26 should find the subpoenas and search warrants at issue here constitute written demands for non-
 27 monetary relief within the meaning of “Claim” under the Policy. As in those cases, the
 28 government in this case demanded, via subpoenas and search warrants, relief in the form of
 29 documents and testimony from Ocean Beauty and the Individual Insureds. Ross Decl., Exs. B–
 30 E. And as in those cases, Ocean Beauty and the individual insureds were obliged to respond to
 31 the demands at penalty of legal process. *See id.* The subpoenas and search warrants here qualify
 32 as “written demands for non-monetary relief,” and as such are covered Claims against which
 33 Ocean Beauty is entitled a defense.

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 43 National Union will argue that this Court should follow the few federal district court
 44 cases that hold a subpoena does not constitute a “Claim” under a D&O policy. In *Center for*

1 *Blood Research, Inc. v. Coregis Ins. Co.*, the court held a government investigative subpoena
2 was not a demand for “relief” because the word, defined in the context of other terms in the
3 policy requiring a “binding adjudication” of liability, required a demand for “court-ordered
4 benefit.” 2001 WL 34088617, at *2 (D. Mass. Nov. 14, 2001). There is no requirement of a
5 binding adjudication in the Policy’s definition of “Claim” here.
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11 Similarly, in *Diamond Glass Cos., Inc. v. Twin City Fire Ins. Co.*, the court held that
12 grand jury subpoenas and search warrants incident to a government investigation of Diamond
13 Glass’s business practices did not qualify as a “written demand for . . . nonmonetary relief.”
14 No. 06-CV-13105, 2008 WL 4613170, at *4 (S.D.N.Y. Aug. 18, 2008). Relying on *Center for*
15 *Blood Research*, the court found “relief,” read in the context of the particular policy at issue,
16 meant the “redress or benefit . . . that a party asks of a court.” *Id.* In adopting *Center for Blood*
17 *Research*’s definition of “relief,” the *Diamond Glass* court failed to acknowledge its ties to the
18 policy’s requirement that there be a “binding adjudication” of liability for a loss to be covered.
19 By contrast, here, the National Union Policy expressly states that “written demand . . . for non-
20 monetary relief” includes a request to toll or waive a statute of limitations. Ross Decl., Ex. A,
21 at 2, § 2(b)(1). Such a request plainly does not seek “redress or benefit” from a court.
22
23 Moreover, even under *Diamond Glass*’s reading, investigative subpoenas and search warrants of
24 the type at issue here *do* seek “relief” from a court—in the form of compelled production of
25 information. A Washington court would decline to apply *Diamond Glass*’s anomalous analysis
26 to our facts.
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33 Also distinguishable is the Southern District of Florida’s 2010 decision in *Office Depot,*
34 *Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 734 F. Supp. 2d 1304 (S.D. Fla. 2010).
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1 There, the court held Office Depot could not recover its costs incurred in responding to an SEC
2 investigation because the investigation was not a covered “administrative or regulatory
3 proceeding” within the definition of “Claim.” *Office Depot*, 734 F. Supp. 2d at 1316–17. In
4
5 *Office Depot*, however, the policy’s definition of “Claim” expressly excepted “administrative or
6
7 regulatory . . . investigation[s] of an Organization” from coverage. *Id.* (emphasis added).
8
9 Thus the court held the parties could not have intended to include government “investigations”
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11 within the covered government “proceedings.” *Id.* at 1317. Here, the Policy’s definition of
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13 claim contains no such carve out for investigations.
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17 Ultimately, however, under Washington’s duty-to-defend law, Ocean Beauty does not
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19 need to prevail on this case law debate. Even if the Court were to credit the analyses in *Center*
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21 *for Blood Research*, *Diamond Glass*, and/or *Office Depot*, these cases, read together with
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23 *Polychron*, *Gold Tip*, *Agilis*, *Minuteman*, and *Richardson* in the absence of controlling
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25 Washington law, create at minimum **a legal uncertainty** that National Union was required to
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27 resolve in favor of defense. In *Woo*, the insurer obtained a coverage analysis from outside
28
29 counsel, and the court still found a breach of the duty to defend. 161 Wn.2d at 60. Here,
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31 National Union did not even go that far. In fact, as noted above, National Union neither
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33 followed up to learn the full extent and nature of the claims nor sought advice from coverage
34
35 counsel. *See Cordell Decl.*, Ex. C.
36

37 Like the courts in *American Best Food* and *Woo*, this Court should hold National Union’s
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39 duty to defend was triggered when the search warrants were executed and the subpoenas were
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41 served. To do otherwise would be to allow the insurer to give itself, not its insured, the benefit
42
43 of the doubt, contrary to Washington law. *Woo*, 161 Wn.2d at 60.
44
45

C. The August 2011 Plea Demands and February 27, 2012 Settlement Demand Are Claims Under the Policy, and Are Indistinguishable from the April 2012 Communication that National Union Accepted as a Claim.

Ocean Beauty respectfully submits that the Court should have no difficulty ruling that that the December 2008/early 2009 search warrants and subpoenas constitute a “Claim” under the Policy. Were it not to do so, however, it should at minimum find the August 2011 plea demands to the individual insureds triggered National Union’s defense obligation. Because they demand “court-ordered” redress in the form of guilty pleas to misdemeanor violations of criminal laws punishable by prison time and monetary restitution, the plea demands qualify as “demand[s] for . . . relief” even under the reasoning set out in *Center for Blood Research*, *Diamond Glass*, and *Office Depot*. Indeed, the 2011 plea demands are substantively no different than the April 24 communication from Justice confirming a global plea demand—the communication National Union does concede constitutes a “Claim” under the Policy.

Even less distinguishable from the April 24 letter is Assistant U.S. Attorney Westinghouse’s February 27, 2012 written confirmation that Justice was seeking a global settlement. *See* Cordell Decl., Ex. A. Even under National Union’s reading of the Policy’s definition of “Claim,” the duty to defend was triggered at the very least as of this date.

D. National Union Is Liable for Ocean Beauty’s Defense Costs from December 2008 Through the Date of the Court’s Ruling on this Motion—the Period of Legal Uncertainty—Regardless of the Court’s Ultimate Coverage Decision.

Once the duty to defend is triggered in Washington, the insurer must continue to defend “until it is clear that the claim is not covered.” *Am. Best Food*, 168 Wn.2d at 405. In the face of factual or legal uncertainty concerning whether the duty to defend attaches, an insurer may not “desert [its] policyholder[] and allow [it] to incur substantial legal costs while waiting for an indemnity determination.” *Id.* (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d

1 751, 761 (2002)). Instead, the proper avenue is for the insurer to defend under a reservation of
2 rights and seek a declaratory judgment as to coverage. *Id.*

3
4
5 Here, the period of factual and legal uncertainty began in December 2008 when the first
6 subpoena was served, and will not end until this Court makes a definitive ruling concerning the
7 definition of “Claim.” National Union, then, is liable for all of Ocean Beauty’s defense costs
8 incurred during this time, regardless of the Court’s ultimate coverage determination. *See id.*

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13 **E. National Union’s Notice-Based Defense Fails.**

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15 **1. The Issue—National Union Claims Ocean Beauty Did Not Use the “Magic**
16 **Word.”**

17
18 National Union has argued—not during its actual handling of this claim, but only later, in
19 this litigation—that Ocean Beauty did not adequately request coverage from National Union at
20 the time of the December 2008 search warrants and subpoenas. The insurer’s argument is based
21 on the fact that pursuant to Clause 8 of the Policy, its duty to defend, as opposed to the duty to
22 advance defense costs, is triggered only by the insured’s written “tender” of the claim within
23 30 days of the date the claim is first made against the insured. *See* Ross Decl., Ex. A at 11, § 8.
24 Although National Union cannot deny that Ocean Beauty provided written notice of the
25 subpoenas and search warrants on December 30, 2008—within 30 days of the government’s
26 search—it argues such notice did not trigger its duty to defend under Clause 8 because Ocean
27 Beauty did not use the word “tender” or otherwise expressly demand a defense. This argument
28 fails for three independently sufficient reasons.
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1 **2. There Is No Material Difference Between a Duty to Defend and a Duty to**
 2 **Advance Defense Costs: The Standard Is the Same and National Union Was**
 3 **Obligated to Do One or the Other.**
 4

5 Most importantly, National Union’s argument that its duty to defend was never triggered
 6
 7 ultimately raises a distinction without a difference. The Policy is clear that even where there is
 8
 9 no duty to “defend,” National Union still owes a duty to advance defense costs. *Id.* at 12. Under
 10
 11 the Policy, the duty to defend and the duty to advance defense costs differ in only two ways: (1)
 12
 13 if the insured elects to proceed under the duty to advance, the insured retains greater control over
 14
 15 the defense and choice of counsel; and (2) under the duty to advance, the insurer may be able to
 16
 17 recoup defense costs paid if it is ultimately determined there is no indemnity coverage. *See id.* at
 18
 19 11-12, § 8. Neither of these differences is material to the issue at hand: the *start* of the insurer’s
 20
 21 obligation to pay.
 22

23 The courts have acknowledged that, for purposes of determining when an insurer must
 24
 25 begin paying defense costs, the duty to advance such costs is treated no differently than the duty
 26
 27 to defend. *See Liberty Mut. Ins. Co. v. Pella Corp.*, 650 F.3d 1161, 1170 (8th Cir. 2011)
 28
 29 (“[O]ther states’ courts generally have viewed an insurer’s duty to advance defense costs as an
 30
 31 obligation congruent to the insurer’s duty to defend Therefore, even though this case does
 32
 33 not involve a duty to defend, the parameters of that duty . . . guide our analysis of Liberty
 34
 35 Mutual’s duty to reimburse Pella’s defense costs.”). Thus, National Union’s duty to advance
 36
 37 defense costs is triggered by the same “conceivably covered” standard set forth in *Woo* and
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American Best Food, and subject to the same rule requiring resolution of factual or legal uncertainty in the insured's favor. *See id.* (applying Iowa's "potentially covered" rule).⁵

3. Ocean Beauty Unmistakably Sought Coverage—Which Necessarily Included a Defense—and National Union Treated the Claim Accordingly.

Ocean Beauty's December 30, 2008 letter plainly constitutes tender of a defense—the letter specifically states it is a "notice of *claims* and circumstances" (that is, not simply a notice of circumstances that might lead to future claims), attaches the search warrants and subpoenas, and advises National Union that the company was investigating and preparing to respond to the alleged violations of state and federal law. Coopersmith Decl., Ex. A (emphasis added). This is particularly true when the letter is read in light of counsel's February 2009 follow-up e-mail, notifying National Union that certain Ocean Beauty employees had been served with grand jury subpoenas, and expressly requesting a coverage decision:

. . . The company is advancing expenses to both employees, and there are undertakings.

Please confirm that you received this email and let me know if you have questions at this point that will be necessary to make a coverage determination on these matters.

Coopersmith Decl., Ex. D.

Not surprisingly, then, National Union treated Ocean Beauty's communications as tender. In response to counsel's February 2009 e-mail, claims adjuster Dennis Van Dina responded: "Grand jury subpoenas do not trigger coverage under the policy; an indictment is required. However, I am reviewing the file and will soon issue our coverage opinion." Coopersmith Decl., Ex. E. And on March 26, 2009, National Union denied coverage. Coopersmith Decl., Ex. G.

⁵ Moreover, at bottom, for the reasons set forth in Parts III.B, C, *supra*, and the cases cited therein, the search warrants, subpoenas, and plea demands all satisfy the Policy's definition of "Claim," under any conceivable standard.

1 National Union would have had no reason to issue that denial if it did not understand Ocean
2
3 Beauty to be requesting a defense.
4

5 **4. “Tender” Would Have Been Futile, and National Union Cannot Prove**
6 **Prejudice Resulting from Any Failure to Clearly Tender.**
7

8 Even if National Union could establish that the December 2008 tender was insufficiently
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10 specific, it would be relieved of its duty to defend (but not its functionally identical duty to
11
12 advance defense costs) only if it could prove it suffered actual and substantial prejudice as a
13
14 result of a failure by Ocean Beauty to use the magic word “tender” within the prescribed 30-day
15
16 period. *Pederson’s Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 437 (1996)
17
18 (citations omitted); *see also Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 141 (2001) (“Even if
19
20 Allstate’s policy required tender as a condition precedent to the duty to defend (which it does
21
22 not), a showing of actual and substantial prejudice is required before an insured’s breach will
23
24 release an insurer from its duty under the policy—including the duty to defend.”).
25

26 National Union has no colorable prejudice argument—it cannot be overemphasized that
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28 National Union ***flatly denied coverage*** on the basis that no “Claim” had been raised at all. Had
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30 Ocean Beauty used the “magic words” that National Union apparently now contends are
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32 necessary, that effort would have been futile given the inevitable denial of coverage. *See Puget*
33
34 *Sound Serv. Corp. v. Bush*, 45 Wn. App. 312, 318 (1986) (“[T]he law does not require tender of
35
36 a useless performance.”). No amount of specificity in Ocean Beauty’s request for a defense
37
38 would have changed National Union’s position on that issue.
39

40 Further, the regulations promulgated by the Washington Insurance Commissioner prevent
41
42 National Union from engaging in this type of semantic game with its insured. Washington’s
43
44 Unfair Claims Handling Regulations provide as follows:
45

1 The following are hereby defined as unfair methods of
 2 competition and unfair or deceptive acts or practices in the
 3 business of insurance, specifically applicable to the settlement of
 4 claims: . . .

5
 6 (13) Failing to promptly provide a reasonable explanation
 7 of the basis in the insurance policy in relation to the facts or
 8 applicable law for denial of a claim or for the offer of a
 9 compromise settlement.

10
 11 WAC 284-30-330(13).

12
 13 National Union apparently now argues that Ocean Beauty's inartful language when it
 14 tendered the claim in December 2008 was a ground for the insurer's denial of coverage and
 15 affects its current claim for reimbursement of its defense costs. However, National Union failed
 16 to inform Ocean Beauty of the Policy's distinction between the duty to defend and the duty to
 17 advance defense costs, and the insurer certainly never hinted that Ocean Beauty's failure to
 18 "tender" the claim was a factor in the denial. That type of caginess is precisely what the above-
 19 quoted regulation prohibits, and the Court should not permit National Union to raise this
 20 argument, in violation of the regulation, at this time.⁶

21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45

IV. CONCLUSION

31 For the foregoing reasons, Ocean Beauty respectfully requests that this Court grant its
 32 motion for partial summary judgment and enter an order declaring that Ocean Beauty is entitled
 33 to payment of its reasonable and necessary defense costs incurred in defending against the
 34 Department of Justice proceedings described herein. A proposed order is submitted herewith.

42 ⁶ In contrast, and in recognition of the principle behind the cited regulation, National Union's outside counsel asked
 43 for clarification as to whether Ocean Beauty's April 2012 tender of the written demand from AUSA Westinghouse
 44 was intended to be a tender triggering the duty to defend or a request for advancement of defense costs. *See* Cordell
 45 Decl., Ex. C, at 1.

1 DATED this 16th day of May, 2013.

2
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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following.

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